Nos. 14,805 and 14,806

United States Court of Appeals

For the Ninth Circuit

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation,
Appellant,
vs.
JOSEPH A. SICILIANO,
Appellee.

JOSEPH A. SICILIANO,
Appellant,
vs.
AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation,
Appellee.

No. 14,805

AMERICAN PACIFIC DAIRY PRODUCTS, INC., a corporation,
Appellant,
vs.
PACIFIC ENTERPRISES, INC., a corporation,
Appellee.

No. 14,806

Upon Appeal from the District Court of Guam.

BRIEF OF APPELLEES JOSEPH A. SICILIANO AND PACIFIC ENTERPRISES, INC., IN RESPONSE TO OPENING BRIEF OF AMERICAN PACIFIC DAIRY PRODUCTS, INC., APPELLANT.

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PAUL P. O'BRIEN, CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

Comments relating to appellant's statement of the case...... 2

Argument 25

I. Introductory 25

II. Conflict of law problems........................ 26

III. There was a joint venture or partnership by ratification or estoppel between the parties and their rights and liabilities are to be determined in accordance with the written agreement between them............... 28

A. The contract between the parties was ratified by the directors of Appellant corporation.......... 31

B. The execution of contract with Appellee was within the apparent authority of the president.. 37

IV. The term of the partnership by estoppel or joint venture between the parties, as well as all other details of their relationship, is fixed by the agreement between the parties............................ 38

V. Other arguments of appellant.................... 50

VI. Arguments regarding companion case of Pacific Enterprises, Inc. v. The Dairy Queen................. 52

VII. Comments on appellant's points Number IX (page 70), X (page 73) and XI (page 74).............. 52

VIII. Conclusion 54

Table of Authorities Cited

Cases

Pages

Aigeltinger, Inc. v. Burke (1917) 176 Cal. 621, 169 P. 373 35

Bates v. McTammany (1938) 10 Cal. 2d 697, 76 P. 2d 513..43, 47

Bernheim v. Porter, 2 Cal. Unrep. 349, 4 P. 446........... 41

Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601....... 49

Carrie v. Cloverdale Co., 90 Cal. 84, 27 P. 58............. 41

Castagnino v. Balletta (1889) 82 Cal. 250, 23 P. 127....... 30

Clafin Co. v. Gross, 112 Fed. 386......................... 49

Coots v. General Motors Corp. (1934) 3 C.A. 2d 340, 39 P. 2d 838 40

Gribble v. Columbus Brewing Co. (1893) 100 Cal. 67, 34 P. 527...................................... 35

Irer v. Gawn (1929) 99 C.A. 17, 277 P. 1053.............. 49

Kimball v. Gearhardt (1859) 12 Cal. 27.................. 51

Lampher v. Washauer, 28 C.A. 457, 152 P. 933............ 41

Martin v. Burris (1922) 57 C.A. 739, 208 P. 174.......... 52

Mervyn Investment Company v. Biber (1921) 184 Cal. 637, 194 P. 1037................................. 28

Naylor v. Adams (1911) 15 C.A. 548, 115 P. 335.......... 30

Newhall v. Joseph Levy Bag Co. (1912) 19 C.A. 9, 124 P. 875...................................... 35

Sessions v. Pacific Imp. Co. (1922) 57 C.A. 1, 206 P. 653.. 30

Simmons v. Ratteree Land Co. (1932) 217 Cal. 201, 17 P. 2d 727 32

United States v. Johnson (1950) 181 F. 2d 577............ 27

Zeibak v. Nasser (1938) 12 Cal. 2d 1, 82 P. 2d 375..43, 45, 46, 47

Codes

California Civil Code: Page
Section 2432 45

California Corporations Code:
Section 15038 45

Guam Civil Code:
Section 355 31
Section 1646 27

Guam Code of Civil Procedure:
Section 2102 40

Texts

80 ALR, page 1049 45

11 Cal. Jur. 2d, Sections 61 and 62 27

14 Cal. Jur., page 760 49

Restatement, Contracts, Section 80 39

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IN RESPONSE TO OPENING BRIEF OF
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COMMENTS RELATING TO APPELLANT'S STATEMENT OF THE CASE.

Appellant has erred in several instances in his Statement of the Case and has omitted some significant facts. It is Appellee's position that these errors and omissions combine to create an erroneous perspective on the transactions between the parties. In his opening brief Appellee, as Cross-Appellant, set forth what is believed to be an accurate statement of the facts in this case and reference is made to that statement for the details. However, some of the errors and omissions appearing in Appellant's Statement which fail to do equity as to the transactions between the parties are as follows:

A.

The implication is created that Appellee did nothing in connection with the partnership business until after the store on Guam was opened and ready for business and that thereafter Appellant generously sold a half interest in the business to Appellee for Fifteen Thousand Dollars ($15,000.00), whereas the actual investment of Appellant was approximately Forty-Three Thousand Dollars ($43,000.00). Thus, for example, on page 6 of Appellant's Brief it is stated:

> "During this period and before any agreement with the Appellee was consummated, Mr. Thompson acting on behalf of the Appellant, opened the store on Guam on July 22, 1952. (R. 321)"

An examination of page 321 of the Record does not support such a statement and it is perfectly clear from other testimony that Mr. Siciliano and Mr. Thompson

jointly opened the ice cream store and had been working jointly toward this opening for a considerable period of time. Actually, the Record is abundantly clear that the partnership agreement between the parties was the result of years of negotiation and was an absolute necessity insofar as Appellant was concerned because the enterprise had neither manager, employees or money at the time Appellee was admitted into partnership.

As early as 1950 Mr. Siciliano (Appellee here) was helping the president of Appellant corporation to get his venture started. The parties continuously corresponded and for a substantial period of time Mr. Siciliano was managing agent of the Appellant corporation in Guam. The correspondence ultimately matured into the partnership agreement which is the basis of this action. The matter is clearly set forth in Mr. Thompson's (president of Appellant corporation) testimony, starting on pages 249 and 254 of the Record, as follows:

> "Q. And did your correspondence with Mr. Siciliano, starting in 1950, continue right on to June, '52?
>
> A. The correspondence did but the relation ceased in May when he wrote me—let me go back a moment. When I came over in February, 1951, I had never seen Mr. Siciliano. I met him the morning I landed and we introduced ourselves. He took me up to see the Governor. The Governor was the only one I knew on Guam. He took me in to see Mr. Guerrero, Land Commissioner, and Mr. O'Connor and others and he wanted 50 per cent of the deal when he discussed it and I told

him we couldn't give him 50 per cent of the deal. I offered him 20 and when he still wanted 50 I explained to him that none of us had that much. It would have made him the largest stockholder of them all. I don't think he said he would take 20 but I left here thinking he was going to buy stock like the rest of us. On May 12 I heard from him and he had been thinking it over and he was no longer interested in the deal unless it was a 50 per cent deal but he would be glad to help me in any way. I asked him to contact Slaughter or I contacted Slaughter by letter. I don't know whether Mr. Siciliano contacted Slaughter or not even though he had offered to do anything he could to help.

Q. He was never compensated for that assistance?

A. It was just friendliness; at least I thought it was.

Q. He has never presented you with a bill?

A. Oh, no.

* * * * * * *

Q. Was he authorized in 1951 to act as your agent?

A. He was, yes, sir.

Q. Did he look for land for you and write to you about it?

A. He did. * * *"

* * * * * * *

"* * * Q. First, I will show you Plaintiff's Exhibit 1 which purports to be a certified copy of a resolution adopted by the American Pacific Dairy Products at a meeting held on March 2, 1951, appointing Mr. Joseph Siciliano managing resident agent of Guam for the corporation and ask you if that, in fact, occurred on that date?

A. On March 2, 1951? That is about the time I returned to Seattle then.

Q. And this is the official appointment of him as managing agent?

A. Yes, sir. * * *"

In addition to all of the services performed by the Appellee as above set forth, it is equally clear that at the time of the execution of the partnership agreement which is the subject of this action Appellant corporation was insolvent and, hence, unable to get started in business without additional cash. The testimony of the president of the Appellant corporation, Mr. Thompson, starting on page 192 of the Record, sets forth the condition of the Appellant in June 1952 as follows:

> "Q. Let me ask you a question a little differently. As of the time that the Dairy Queen of Guam opened what was your total investment in the Dairy Queen of Guam at that time?
>
> A. At the time the Dairy Queen of Guam opened on June 22, 1952, it was approximately $42,500, give or take a few dollars.
>
> Q. That was regardless of any amount contributed by Mr. Siciliano?
>
> A. That is right, yes.
>
> Q. Now, that also was the total amount of your capital, wasn't it?
>
> A. No; we had a thousand or so dollars in the bank.
>
> Q. And that is all you had left?
>
> A. We had $550 stock that had not been paid for.
>
> Q. Was the corporation indebted to the extent of about $8,000 in Guam?

A. That is right, sir.

Q. And the debt was unpaid?

A. It had not been paid but it was not delinquent.

Q. And there was no capital in the corporation to pay the debt?

A. Oh, we called on the stockholders whenever we needed money. We could have gotten the money if that is what you mean.

Q. Did you have any cash in the corporation to pay that debt?

A. We had borrowing ability; we had stockholders.

Q. But you had no cash?

A. No, sir. * * *"

Also, it is equally clear from the Record that Appellee obtained and used employees from his own company to open the store and in fact was not only active but was the dominant factor in getting the ice cream store open. Thus, Appellee's uncontradicted testimony, beginning on page 145 of the Record, reads in part as follows:

"Q. Now after these agreements what did you do?

A. Went right to work and opened up the Dairy Queen. In fact we were working on the opening at that time. I opened it as soon as possible and I worked there for a week or so, broke in the boys, got my best boys down there who knew about ice cream and broke them in on what to do to make and sell ice cream. I got a few pointers from Mr. Thompson before he left and went right to work with them.

Q. You referred to good boys. Are you referring to employees of Pacific Enterprise?

A. Yes.

Q. Did you ever operate an ice cream business before?

A. Oh, I did.

Q. Where?

A. 20th Air Force Base.

Q. Was that on the island of Guam?

A. Yes.

Q. When was that?

A. 1948. We had one of the largest ice cream plants on the island of Guam and I was allowed to sell out of my own snack bar. I had to supply them first.

Q. Had any of these employees you put in the Dairy Queen of Guam any previous experience?

A. They had. (16)

Q. They had worked around ice cream?

A. Yes.

Q. And it was for that reason you chose them, is that correct?

A. Oh, yes.

Q. Now, did you also, at the same time you were breaking in these boys, did you also have one of your key supervisory employees working with you?

A. Joseph Meggo. M-e-g-g-o.

Q. Now, how many snack bar and restaurant operations have you and Joe Meggo operated on the island of Guam?

A. I operated a large cafeteria which fed 2 to 3,000 people a day and I opened nine snack bars, plus the ice cream plant at Harmon Field.

Mr. Phelan. If it please the court, I can't see what those snack bars have to do with the Dairy Queen of Guam.

The Court. Part of your defense is failure to properly operate the Dairy Queen. I think the

purpose of this line of questioning is to establish the competency of operation at the time the snack bar or the ice cream place was opened. Your objection will be overruled.

Q. (By Mr. Bohn). Now, did Mr. Joseph Meggo also act as one of your supervisors when you were running the ice cream plants at Harmon Field?

A. He was supervisor of all the snack bars, also the ice (17) cream plant.

Q. Mr. Joseph Meggo worked with you while you were opening up the Dairy Queen, is that correct?

A. He did.

Q. And did you then turn over the supervision of Dairy Queen to Mr. Meggo?

A. I did.

Q. And did Mr. Meggo in fact supervise the operations of Dairy Queen?

A. He did.

Q. And for how long a period was that?

A. Well, up to when Mr. Norman Thompson took over.

Q. And the man that was in charge of the Dairy Queen until Mr. Norman Thompson took over was Mr. Joseph Meggo, is that correct?

A. That is right. * * *"

B.

Likewise, the Statement of the Case by Appellant, beginning on page 6, with regard to the respective investments of the parties does not provide a fair basis to judge the equities of the situation. It is true that the president of the Appellant corporation did testify that the Appellant corporation had actually expended

some Forty-Two Thousand Five Hundred Dollars ($42,500.00) prior to execution of the contract with Appellee. However, Appellant's Statement of the Case omits reference to the fact that some of the money had been unwisely spent and did not represent a true value of the assets. The Record of Mr. Thompson's testimony on page 268 contains the following statement on this subject:

> "* * * In doing business with Joe, Joe said, 'You paid too much for the building.' I said, 'I think so too,' so we cut it down for a meeting of the minds, your Honor, * * *"

So, also, the testimony of Mr. Thompson on the same subject, beginning on page 268 of the Record, reads in part as follows:

> "Q. As you started out with your partnership agreement you had a capitalization of $38,000, whatever it is, which represents $15,000 of yours and $15,000 of Siciliano's and the balance was reflected in debts?
>
> A. No; the balance is excess in value that was turned in and it was to come to us.
>
> Q. But there was the $8,000 in debts? (154)
>
> A. No; $8,000 debts to American Pacific.
>
> Q. I am getting argumentative about the debt. I apologize to the court. Isn't it a fact that at the time you made this deal Dairy Queen of Guam owed Overseas Construction?
>
> A. We owed Overseas Construction about $5,000. We might have owed other creditors; I don't know.
>
> Q. So the real capitalization at that date was about $35,000?

A. No, sir; $38,000.

Q. The partnership paid it to you and you paid the bills?

A. Yes; same thing.

Q. In other words, the net worth was roughly $30,000?

A. *No; roughly $33,000.*

Q. You started the Dairy Queen then under the partnership agreement with a net worth of roughly $33,000?

A. That is right, yes.* * *" (Emphasis added.)

Actually, the testimony on this particular matter may be superfluous since the signed Supplemental Agreement between the parties clearly specified the investment understanding. This agreement, which appears in full beginning on page 51 of the Record, supplements the partnership agreement between the parties and insofar as the capitalization is concerned, the significant portions read as follows:

"* * * Witnesseth:

Whereas, the Party of the First Part has prior hereto expended Thirty-eight Thousand Twenty-six Dollars and No Cents ($38,026.00), in connection with activating a Dairy Queen store in the territory of Guam; and * * *"

It is perfectly clear from the foregoing agreement and from a fair summary of all the testimony in the case that the true net worth of the partnership business at the time of its commencement was computed by the parties to be and actually was Thirty-Eight Thousand Twenty-Six Dollars ($38,026.00), less an account payable to a construction company in the

amount of Six Thousand One Hundred Fifty Dollars and Fifty-Seven Cents ($6,150.57) or a true net worth of Thirty-One Thousand Eight Hundred Seventy-Five Dollars and Forty-Three Cents ($31,875.43). It is equally clear that for a one-half interest in these assets Joseph Siciliano, the Appellee here, paid Fifteen Thousand Dollars ($15,000.00) or very close to one full half of the actual value of the assets before the execution of the partnership agreement. By the execution of the partnership agreement and the Supplemental Agreement above referred to, the accounts payable of the venture were increased from Six Thousand One Hundred Fifty Dollars and Fifty-Seven Cents ($6,150.57) to Eight Thousand Twenty-Six Dollars ($8,026.00) so that the net worth of the venture at this point became Thirty Thousand Dollars ($30,000.00) and the Fifteen Thousand Dollars ($15,000.00) paid by Mr. Siciliano represents exactly one-half of said net worth.

If any additional evidence were needed, one only needs to turn to paragraph 5 of the partnership agreement (Record, page 9) which reads as follows:

> "* * * 5. Capital Contributions. Each of the parties hereby contributes to the capital of the partnership the following respective amounts:
> First Partner..........$15,000.00
> Second Partner..........$15,000.00 * * *"

The general assumption of the Appellant here is that its board of directors had the right to accept or reject the partnership contracts at any time they chose, regardless of the reliance upon them by all

other parties. It is this general contention on the part of the Appellant, as emphasized in the entire statement of Appellant's case, that forces the Appellee to question the good faith of Appellant in all of its dealings with the Appellee and with the public.

It is clear that the president of Appellant corporation had been in and out of Guam since 1950, seeking to place an ice cream store in operation there. The Record is replete with reference to conversations had with the Governor, with the Director of Commerce and with other public and private citizens in that territory. There is no hint that any one in Guam was ever informed that the president had only limited authority and in fact in June of 1952 he signed a series of contracts and documents for and on behalf of Appellant corporation, as follows:

a. Partnership contract with Joseph Siciliano (Record, page 8);

b. Supplemental Contract with Joseph Siciliano (Record, page 51);

c. Assignment of Lease of Real Property from American Pacific Dairy Products, Inc., to the co-partnership (Record, page 54);

d. Certificate of Co-partnership Transacting Business under a Fictitious Name (Record, page 58);

This document (item "d" above) which recites the existence of the co-partnership with Mr. Siciliano as a co-partner was filed with the Department of Finance of the Government of Guam and on page 144 of the Record there was admitted in evidence Plaintiff's

Exhibit Number 6 which was a certificate dated August 21, 1952, signed by the Director of Finance, indicating that the Certificate of Co-Partnership Transacting Business Under a Fictitious Name was received on August 1, 1952, and entered as Document Number 23 in the records of Guam. Furthermore, as of the date of the trial of this action this Certificate of Co-Partnership Transacting Business Under a Fictitious Name had never been cancelled or modified so that the public records of Guam still indicate the existence of such co-partnership. In this connection Mr. Thompson, president of the Appellant corporation, testified as follows:

> "* * * Q. Do you have a cancelled certificate of co-partnership agreement filed with the Government of Guam?
>
> A. No.
>
> Q. To your knowledge is that still in existence?
>
> A. I haven't the slightest idea.
>
> Q. Is it possible the public, at least, thinks this is still a partnership operated by American Pacific Dairy and Joseph Siciliano?
>
> A. I don't think the public would go down and read the articles of incorporation. I don't know what the public believes.
>
> Q. I am stating that this was a partnership and you were doing business under the fictitious name of Dairy Queen of Guam——
>
> A. I didn't cancel that. I said that before. * * *" (Record, page 240.)

e. Letter dated June 21, 1952, directed to Major H. W. Grossman, Post Exchange Office, Ander-

son Air Force Base, in which it was stated that the organization was composed of a co-partnership, consisting of, among others, Mr. Joseph Siciliano.

In connection with this document Mr. Edward Thompson, president of Appellant corporation testified on page 258 of the Record, as follows:

"* * * Q. Did you on or about June 21, 1952, join in a letter (143) with Mr. Siciliano directed to Major H. W. Grossman, Post Exchange Office, Anderson Air Force Base?

A. We did, yes.

Q. Did you in that letter state to Major Grossman that you were making a proposition to him about operating a dairy business on the field and did you state that this organization will be a co-partnership composed of Joseph Siciliano and Edward Thompson with, perhaps, several other partners, but in any event all of the majority interest would be Joseph Siciliano's and Edward Thompson's?

A. Yes, I did.

Q. You go on to state that if there is something on Anderson Air Base other partners might come in?

A. That is right.

Q. But you represented to Major Grossman that this was going to be a partnership?

A. That is right, yes. * * *"

All of these documents are complete on their face, representing a concluded transaction, and none of them contain the slightest reference to the fact that

they are subject to any ratification or any further action by the Appellant corporation.

The statement of Appellant's case does not refer to all of the foregoing documents but confines itself to a recitation of the various acts taken or not taken by the Appellant corporation. According to Appellant's statement the documents were received in Seattle in the middle of July 1952 and were presented to the directors in August 1952. No action was taken on them at that time and neither the Appellee nor the government nor the people of Guam were notified that the president had acted without authority. Although still in possession of these documents Appellant continued to do nothing until October 6, 1952, when it adopted a resolution unilaterally without the consent of its co-partner, stating in effect that it would only ratify the agreement upon Mr. Siciliano meeting certain conditions, none of which he was required to meet by the terms of the agreement. Even at this late date neither the public in Guam nor the government of Guam was notified that Appellant corporation did not consider itself bound by these contracts and one can only speculate as to what would have happened had the business failed. Certainly the creditors and others in Guam were not given any warning as to the position of the Appellant herein. NOWHERE IN THE ENTIRE RECORD OF THIS CAUSE IS THERE THE SLIGHTEST EVIDENCE THAT THE BOARD OF DIRECTORS OR THE STOCKHOLDERS OF APPELLANT CORPORATION EVER NOTIFIED ANY-

ONE THAT THEIR PRESIDENT WAS ACTING BEYOND THE SCOPE OF HIS AUTHORITY.

It is at this point also that Appellee is forced to question the integrity of Appellant because on October 9, 1952, the following letter was sent by Mr. Edward Thompson, president of Appellant corporation :

> "* * * Q. LET ME READ YOU SOMETHING AND ASK YOU IF THIS IS YOUR LETTER: 'LAST MONDAY'—DATED OCTOBER 9, 1952—'LAST MONDAY MY ASSOCIATES, HERBERT LITTLE AND GEORGE HENRYE, WHILE DISCUSSING OTHER MATTERS IN WHICH WE ARE INTERESTED *FORMALLY APPROVED THAT AGREEMENT* WHICH I MADE WITH JOE SICILIANO LAST JUNE ON GUAM. (276) THERE NEVER WAS ANY QUESTION ABOUT NOT APPROVING THE AGREEMENT, BUT I PURPOSELY REFRAINED FROM HAVING IT FORMALLY APPROVED ERE NOW, BECAUSE I THOUGHT IT POSSIBLE THAT THE LACK OF APPROVAL MIGHT SOMEHOW SOME TIME HELP JOE IN HIS TROUBLES.' DO YOU STAND ON THAT NOW, MR. THOMPSON?
>
> A. I DID SAY THAT.
>
> Q. DID YOU RECITE THAT?
>
> A. I DID BECAUSE I COULD HAVE FORCED THE BOARD TO RATIFY IT. * * *" (Record, page 379.)

It is this letter and testimony which appellant dismisses in his statement of the case (page 8) with the following language:

> "* * * Several days later a personal letter was sent by Mr. Edward Thompson to the appellee's attorney on Guam, stating that Mr. Thompson and two of the other directors of the appellant, while discussing other matters, had generally approved the agreement. * * *"

Appellant next points out (page 9) "Appellee did nothing with respect to the resolution of October 6, 1952, * * *." Just what was expected of Appellee when he had been advised by the president of the corporation that the contracts had already been ratified is not clear, but the statement of the case goes on to recite that finally and on April 4, 1953, the board of directors of Appellant corporation adopted another resolution which stated, among other things, that it now refused to ratify the contracts. This resolution contained a whole series of self-serving statements, most of which were without any basis in fact and, among other things, sought to terminate the partnership in the following language:

> "2. The de facto partnership heretofore operating the 'Dairy Queen of Guam' is hereby terminated effective April 21, 1954 (1953)."

This is particularly surprising when it is recalled that during all this period of time the business in Guam was being managed under the control of Joseph Siciliano's agents and employees and the business had been making a very substantial profit each month. Perhaps this profit is the real reason why in the same resolution the directors of Appellant corporation offered to return the original investment of Appellee,

providing he signed what in effect were complete releases of all of his interest in the business.

D.

In discussing the management of the store in Guam Appellant's statement of the case at several points refers to Mr. Edward Thompson's activities during the period of time the store was under the management of Mr. Siciliano's employees, with the implication that Mr. Thompson himself was part of the management of the business. This is not an accurate statement of the fact. On page 330 of the Record Mr. Thompson described his capacity during this period, as follows:

> "Q. (By Mr. Phelan). Did you act for Dairy Queen of Guam in the States as their purchasing agent or what capacity?
>
> A. I was the purchasing agent. That is all that I did, yes.
>
> Q. You placed orders and saw to the paper work?
>
> A. Yes, saw they got on board ship—that sort of thing—paid the bills and sent all the documents to Guam. * * *"

During this same period of time the daily management of the business on Guam was under the direction of a Mr. Joseph Meggo, who was an employee of Pacific Enterprises, Inc., which was owned and controlled by Mr. Siciliano, and an experienced supervisor of businesses engaged in the sale of ice cream and food products. Mr. Meggo's testimony on this point is in part as follows:

"* * * Q. When did you first start performing any services in connection with the Dairy Queen of Guam?

A. When Mr. Thompson and Mr. Siciliano opened up the Dairy Queen I was helping out, bringing supplies down and all that. I worked up odds and ends, back and forth, a few hours a day, helping Joe and when Mr. Thompson left the island I was Joe's right-hand man for the Dairy Queen four or five hours a day. I even brought his lunch to him. He didn't leave it. His heart and soul was in the Dairy Queen and he showed me the way Mr. Thompson showed Mr. Siciliano and Mr. Siciliano was teaching me the way Mr. Thompson taught Mr. Siciliano.

Q. And you were familiar with the requirements from operating the ice cream plant at Harmon?

A. I was.

Q. You know about bacteria count and so forth?

A. I did.

Q. And you knew how to store ice cream and dispense it?

A. I did.

Q. Now, after Mr. Siciliano left Guam, what service did you continue for the Dairy Queen?

A. He put me in charge of the Dairy Queen and I followed on exactly how he showed me. (38)

Q. How long did that continue with you as manager of Dairy Queen?

A. Well, until Mr. Thompson, Jr., arrived in Guam.

Q. About when was that, do you remember?

A. I can't recall because I was responsible for Pacific Enterprises, too.

Q. You were continuously the manager until Mr. Norman Thompson took over, is that correct?

A. That is right.

Q. How many days a week did you perform services for the Dairy Queen?

A. Seven days a week.

Q. Is that true throughout the entire period?

A. Every day I was at the Dairy Queen. * * *" (Record, page 165.)

The management of this business during this period is best summarized by the following statement of the court (Record, page 316):

"* * * The Court. Well, Mr. Phelan, you have a peculiar theory of abandonment. Where did your money come from? Where did your profits come from?

Mr. Phelan. I don't know.

The Court. Certainly not from an idle operation.

Mr. Phelan. That is true. (209)

The Court. Who ordered the materials? Who served ice cream? Who furnished the reefer? Who furnished the supervision? Who furnished the bookkeeping? Who made the reports?

Mr. Phelan. It wasn't Mr. Siciliano.

The Court. Not individually but it was done and it was done by the employees of the corporation which he headed, which according to the testimony, was interchangeable with him. * * *"

E.

The Appellant corporation also, throughout its statement of the case and in the trial itself, complained about the quality of the management of the

business by Mr. Siciliano's employees. It is true that, as set forth on page 11 of the Appellant's statement of the case, the court did find some unsatisfactory conditions at the store when it was taken over by Appellant corporation, but Appellee contends that such conditions for the most part were simply inherent in transacting business in Guam at this time. Certainly, the situation did not improve with the change in management, and it is an extremely odd coincidence, if it is a coincidence, that during the period of time the business was operated by Mr. Siciliano's employees it made a very substantial profit and almost immediately upon the assumption of management by Appellant corporation the profit diminished and later disappeared altogether to the point that it started to lose money each month, rather than make a profit. It is certainly difficult to contend, as the Appellant does, that it "had to finally completely take over the operations to protect itself" (Appellant's Brief, page 11) when it is noted that this business under the management of the Siciliano organization made in excess of one hundred per cent (100%) profit during one year's operation. As previously pointed out the net assets of the partnership at its commencement was Thirty Thousand Dollars ($30,000.00) and the profit as found by the court (Record, page 110) after approximately eleven (11) months' operation was Thirty-One Thousand Four Hundred Three Dollars and Forty-Seven Cents ($31,403.47). Appellant seeks to overcome this record of accomplishment by stating in substance that business was good during this period of time and then adds that

beginning later in 1953 business conditions in Guam worsened. There is no evidence to support such a statement and it is just as likely that poor management and excessive expenses, such as traveling expenses of the president of Appellant corporation caused the profits to diminish and finally disappear.

So, also, there is considerable complaint throughout this case that Mr. Siciliano was derelict in his duty in not opening another store in Guam to sell additional ice cream products, and Appellant makes considerable point of the fact that it did so beginning in November 1953. Yet the record amply indicates that the opening of this second store was exceedingly bad business judgment. Beginning at page 239, the Record gives the history of the opening of this second store, pointing out that a total of Twenty-Six Thousand Seven Hundred Forty Dollars and Sixty-Three Cents ($26,740.63) was taken from the assets of the partnership for the purpose of opening this new store and that the first expenditure therefor was in November 1953. These expenditures started in November 1953, and it took until September 1954 to actually get the store opened. Furthermore, when the new store did open the existing store immediately began to lose money for the first time and has continued to lose money ever since. On this point the Record, beginning at page 214, reads in part as follows:

> "* * * Q. When did Guam Frozen Products open their store? (125)
>
> A. I would say just before September, 1954.
>
> Q. Just before September?
>
> A. Yes, sir.

Q. If I am correct, your previous testimony was that it was in the month of September, 1954, that the Dairy Queen of Guam began to lose money, the first store?

A. I don't think there is any connection there.

Q. Just answer the question.

A. Yes.

Q. Isn't it a fact that for every month since and including September, 1954, the original store has lost money, according to your records?

A. Yes.

Q. Isn't it also true that Guam Frozen Products opened a competing store?

A. That is right; yes, sir.

Q. Do you have any idea what the situation is for January, 1955?

A. Not too good. About the same. We can tell.

Q. When you opened the other store——

A. Well, that isn't the cause of it.

Q. But the fact is that when you opened the other store the sales went down?

A. Yes; we had two drops in sales. We had a drop last spring, too. (126)

Q. This is the first month that the Dairy Queen of Guam ever lost money?

A. That is correct.

Q. But the sign, 'Dairy Queen' is also on the other store?

A. That is right, yes. * * *"

In short, there is a clear indication that all the Appellant did by opening the new store was to divide the business with the one already in existence, and the situation became more aggravated when it is recognized that this new store is owned by an entirely

new corporation in which the Appellant corporation owns stock with others. Thus, the Appellant took part of the assets of the partnership and diverted them to a competing corporation financed almost completely by these diverted assets. Furthermore, there is additional dissipation of the assets of the co-partnership in that the son of Edward Thompson received Five Hundred Dollars ($500.00) per month for managing the existing store and only One Hundred Dollars ($100.00) per month for managing the competing store owned by a different entity (Record, page 243).

F.

Appellant, in its statement of the case, also makes several references to the companion case of Pacific Enterprises, Inc., vs. the co-partnership. The issues in this case are all questions of fact based in some part on a conflict in evidence, but mostly upon admitted statements of fact. It would appear, therefore, that matters involved in this case would be within the discretion of the trial court who had an opportunity to hear the witnesses and form its conclusions as to their credibility. In this connection the record indicates that the court devoted a great deal of time to considering each item of the account separately and voluminous testimony was taken on all disputed items.

However, it is significant to note that nowhere in the statement of Appellant's case does it refer to the fact that although Joseph Meggo, as supervising manager, and Henry Diza, as bookkeeper, performed services by the partnership but were in fact paid by

Pacific Enterprises, Inc. It is true that in the case of Pacific Enterprises, Inc. versus the co-partnership request was made of the court to provide for the payment of salaries to these persons for services rendered to the co-partnership, but this the court declined to do, presumably on the theory that this was a contribution by Mr. Siciliano in lieu of other management services. This is in accordance with Appellee's theory of this case which contends that even if Mr. Siciliano were obligated to manage the business (which the contract does not require), he fully performed these management services through these qualified employees. It should be especially noted, however, that the Five Hundred Dollar ($500.00) per month fee which the partnership agreement provides for in the event he is managing the business was not included in the judgment awarded to him on the dissolution of the partnership.

ARGUMENT.

I. INTRODUCTORY.

Appellee's theory of this case is set forth in some detail in an Opening Brief filed by Appellee as a Cross-Appellant in the case of *Joseph A. Siciliano v. American Pacific Dairy Products, Inc.,* which was, as therein indicated, an action to dissolve a partnership in accordance with the laws of Guam. In responding to Appellant's Brief, Appellee presents the following arguments in opposition to said brief and to support his theory of this case.

II. CONFLICT OF LAW PROBLEMS.

In item number I and throughout its Opening Brief Appellant makes considerable point of its contention that there are substantial problems of conflict of law involved in this cause. Appellee cannot agree with this contention. In its essence the action is a simple one. Plaintiff and Defendant executed a partnership agreement in Guam to be performed in Guam and action for dissolution of the said partnership was commenced in Guam. Thus, the place of execution, the place of performance and the place of forum are all located in the territory of Guam.

Appellant, however, contends that even though the partnership contract was executed in Guam by the president of Appellant corporation, this was not within the scope of his authority and, hence, required ratification by the board of directors. Appellant then contends that since such ratification is required, the law of the place of making the contract would be in Seattle, Washington, because that was the home office of the corporation, even though it was organized for the sole purpose of doing business in Guam and was in fact authorized to do business in Guam as a foreign corporation.

From this Appellant draws the conclusion that the laws of the State of Washington govern both the authority of the president to enter into a partnership contract and the authority of the corporation itself to execute such an agreement without authority to do so in its Articles of Incorporation. Having sought to establish this point, Appellant then says that there are no cases in the State of Washington on either of

these subjects which would seem to leave the question right where it started. The question would, therefore, seem to be much more clearly presented under general principles of law which are as applicable to Guam as they are to the State of Washington.

Admittedly, there is some conflict in the authorities as to whether the law of the place of contracting or the law of the place of performance governs the interpretation of a contract, but it is suggested that the better rule applies the law of the place of performance particularly where, as in the case at bar, there is no showing that there is any difference in the statutes or case law of the two jurisdictions.

The territory of Guam has adopted the Uniform Partnership law as part of its codes which are generally patterned after the laws of California using in many instances the same section numbers as the comparable statute in California at the time the Guam Codes were adopted. This was done in Guam and is presently maintained there so that decisions of the highest courts in California would be persuasive authority on the interpretation of the Guam Law (*United States v. Johnson* (1950) 181 F. (2d) 577). It would, therefore, seem appropriate to look to the law of Guam and of California for the decisive factors in this case.

Both California and Guam adopt the rule that a contract is to be interpreted in accordance with the law of the place where it is to be performed. See 11 Cal. Jur. (2d) Sections 61 and 62 and Guam Civil Code Sec. 1646 reading as follows:

> "§1646. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

III. THERE WAS A JOINT VENTURE OR PARTNERSHIP BY RATIFICATION OR ESTOPPEL BETWEEN THE PARTIES AND THEIR RIGHTS AND LIABILITIES ARE TO BE DETERMINED IN ACCORDANCE WITH THE WRITTEN AGREEMENT BETWEEN THEM.

Appellee concedes that in the instant case there is no statute in Guam which authorizes the President of a corporation to enter into a partnership contract and further concedes that the Articles of Incorporation of the Appellant corporation do not contain that express power. However, assuming that this prevents the consummation of a formal partnership, the only effect on the case at bar is one of terminology.

The fact is that an agreement designated as a partnership agreement was entered into between the parties and relying thereon Appellee invested substantial time and money. The fact also remains that the business venture arising out of this contract made substantial sums of money, a large portion of which was due to the intervention, aid and assistance of Appellee. All of this profit and all of the assets of the venture have been confiscated by the Appellant. Certainly, the law does not leave the Appellee without a remedy in this situation.

The rule is well set forth in the California case of *Mervyn Investment Company v. Biber* (1921) 184

Cal. 637, 194 P. 1037. In this case an original partner assigned his rights and liabilities under a written partnership agreement for a fixed term to a corporation. The Appellant in the case was the other original party to the partnership and by the agreement was given the right to acquire a one-third interest in the partnership assets by fulfilling his duties thereunder. The new corporate partner asserted the right to dissolve and thereby cut off Appellant's rights in the partnership contract, basing its right to dissolution upon the lack of corporate power to be in a partnership. The trial court sustained this position, but this decision was reversed by the Supreme Court of California which held that the Appellant was entitled to his rights under the terms of the partnership agreement, despite the fact that the corporation and Appellant were not actually partners. The language of the court at page 643 reads in part as follows:

> "* * * Even where a corporation is without authority under its charter to form a partnership with another, it may be held liable as a partner to prevent injustice. * * *"

And also,

> "* * * It is not necessary to a decision of this case in Appellant's favor that it should appear that Plaintiff corporation became a partner with Appellant upon Werner's transfer to it of his interest. * * *"

And on page 644 the Court also stated,

> "* * * It is entirely clear that the Plaintiff (corporation) by accepting this assignment under the

> express conditions of the original contract is in no better condition than Werner would have been after a voluntary withdrawal from the partnership. * * *"

Beginning on page 39 of its brief, Appellant concedes that it cannot avoid partnership liability and in fact states that it is willing "to meet its just obligations to the Appellee due to his reliance on the appearance of a partnership arrangement". The simple question remaining, therefore, is what is the measure of Appellant's liability, and it is the contention of the Appellee that whether the relationship between the parties be considered a partnership by ratification or estoppel or a joint venture agreement, the rights and obligations of both parties are fixed by the terms of the agreement between them.

In this sense this action resembles an action in the nature of *assumpsit* where a plaintiff chooses to sue on one of the special counts. In such actions the contract between the parties is admissible as an admission of the standard of value or proof of any other fact that determines the plaintiff's recovery (*Castagnino v. Balletta* (1889) 82 Cal. 250, 23 P. 127; *Naylor v. Adams* (1911) 15 Cal. App. 548, 115 P. 335; *Sessions v. Pacific Imp. Co.* (1922) 57 Cal. App. 1, 206 P. 653).

Although dissolution and winding up of a partnership is not in the nature of *assumpsit,* the reason for adhering to the terms of the written contract are equally persuasive since there must be some measure

of the rights of the parties, and the signed contract is the best evidence of the agreement between them.

Furthermore, Guam Civil Code Section 355 reads in part as follows:

> "* * * Any contract or conveyance made in the name of a corporation, which is authorized or ratified by the directors, or is done within the scope of the authority, actual or apparent, given by the directors, shall bind the corporation, and the corporation shall acquire rights thereunder, whether the contract be executed or wholly or in part executory."

It is submitted by the Appellee that the case at bar falls squarely within the provisions of this code section in two respects. First, that the contract was either actually or impliedly ratified by the directors of the Appellant corporation or they are estopped to deny such ratification and therefore estopped to deny the existence of the contract. Second, in any event the execution of such contract by the president of the corporation was within the apparent authority given by the directors to said president.

A. The contract between the parties was ratified by the directors of Appellant corporation.

On October 9, 1952, the president of the Appellant corporation wrote to Appellee as follows:

> "October 9, 1952 * * * 'Last Monday my associates, Herbert Little and George Henrye, while discussing other matters in which we are interested, *formally approved that agreement* which I made with Joe Siciliano last June on Guam. There never was any question about not approv-

ing the agreement, but I purposely refrained from having it formally approved ere now, because I thought it possible that the lack of approval might somehow some time help Joe in his troubles.' * * *" (Record, page 379.) (Emphasis added.)

The conclusion is inescapable, therefore, that either the president of the corporation deliberately misled and defrauded the Appellee or he was correctly stating the real action taken by the corporation. If he was correctly stating the real action of the directors of the corporation, then there was in fact a formal ratification of the contract in spite of the fact that a resolution of the corporation dated October 6, 1952, stated to the contrary. On the other hand, if such resolution reflects the true action of the corporation, then the Court should not lend itself to a fraud by the corporation's president which misled Appellee as to the action of the corporation. The evidence is clear that the president continues to manage the affairs of the corporation and the acquiescence of the board of directors of the corporation in his activities would make the corporation party to the fraud.

Thus, in the case of *Simmons v. Ratteree Land Co.* (1932) 217 Cal. 201, 17 P. (2d) 727, it was held that a land company which retained sales agents in its employ after knowledge of their fraudulent practices became a guilty party to their fraud.

Appellant claims that this letter was improperly admitted into evidence (App. Br. p. 35) apparently on the theory that its only relevancy was to estab-

lish the authority of the president as agent of the corporation. Appellee does not understand the materiality of this argument. The letter was offered and admitted for two purposes. One, to impeach the president who had testified that the Board of Directors had not ratified the contract. Two, as an admission by the highest corporate officer as to what the Directors actually did. The letter of the president (himself a member of the Board of Directors) was directly in contradiction to what purported to be a resolution of the Board at the same meeting. Both were sent to the appellee with *the letter being the later of the two communications.* It would certainly appear relevant to the cause and it seems clearly within the authority of a president of a corporation to report what the Board of Directors did at a meeting.

In any event the directors of the corporation have *impliedly ratified* the action of its president in signing the contract through their acquiescence and silence as to his activities. There is no evidence whatever in the case that the directors have ever repudiated the authority of the president of the corporation and no evidence whatever that they have ever notified either the Appellee or any one else that he did not have authority to execute agreements. In addition to this, of course, the corporation has accepted all of the benefits of the contract. The rule is well set forth in *Ballantine on Corporations,* as follows:

> "§60. If the officers of a corporation or other persons assume to act for the corporation without any authority at all, or if they exceed their authority, or act irregularly, the act may be ex-

> pressly or impliedly ratified by the board of directors, and rendered binding, except as to intervening rights of third persons. In this respect, a corporation is subject to substantially the same rules as an individual. * * *
>
> "A contract made or other act done by an officer or officers of a corporation without authority may be ratified by acts or tacit acquiescence. It need not be by formal vote of the directors or shareholders, as the case may be; but, as in the case of ratification by a natural person, it may be by parol assent, or may be implied from the consent of the shareholders, or of officers having authority to ratify, in accepting the benefits with knowledge of the facts, or otherwise treating or recognizing the contract or act as binding; and under some circumstances it may be implied from a mere failure to repudiate or disaffirm."

In this action the facts show that the officers and directors of the Appellant corporation not only knew of the fact of the partnership agreement and its execution by Mr. Edward Thompson, they also knew of the terms and conditions thereof. The capital contributions of the Appellee were accepted, his ability and influence were utilized, and his agents and employees, through Pacific Enterprises, Inc., supplied the labor to open and run the partnership business during the formative months. Substantial profits were made and were confiscated by the Appellant corporation while in possession of all of the above facts. During this time there was no repudiation of the contract nor was there an express disaffirmance of the president's power to enter into such an agreement on

behalf of the corporation. It is true that in April 1953 the corporation made an attempt to repudiate the contract but such act was over six months after it had purported to "conditionally ratify" the agreement and over ten months after the execution of the contract. Appellee contends that if the Appellant corporation wanted to repudiate the contract on any grounds, it was under an implied duty to do so shortly after having acquired knowledge of all the facts. Failing to do so, and subsequently accepting the benefits of the partnership business, it impliedly, if not actually, ratified the agreement and became bound by its terms. Any subsequent action must necessarily be ineffectual to dissolve the partnership unless in accordance with the terms of the agreement.

Furthermore, the corporation should be estopped from denying that it is bound by the terms of this contract. Estoppel is as applicable to corporations as to individuals. (See *Aigeltinger, Inc. v. Burke* (1917) 176 Cal. 621, 169 P. 373; *Gribble v. Columbus Brewing Co.* (1893) 100 Cal. 67, 34 P. 527; *Newhall v. Joseph Levy Bag Co.* (1912) 19 C.A. 9, 124 P. 875).

The latter case clearly sets forth the law, as follows:

> "* * * It is a fact of common knowledge that a very large part of the mercantile business of the country is, as a matter of convenience, if not, indeed, as matter of necessity, carried on by corporate organizations rather than by partnerships. It would greatly hamper their usefulness if all the daily current purchases and

sales of merchandise could be made only by resolution of directors or that the public dealing with their officers would do so at the peril of having their contracts repudiated when they might happen to be unfavorable to the corporation, or less profitable than was anticipated when made. Suppose an incorporated mercantile house of San Francisco should, in its corporate name, signed by its secretary, and on the verbal authority of the president and one other of the five directors, cable an order to a Paris house for a bale of drygoods of a kind and value previously purchased from the latter by the former. Must the Paris house demand and receive an authenticated copy of a resolution by the board of directors of the San Francisco house authorizing the order for goods before the Paris house could safely fill the order? Suppose the Paris house should ship the goods, and on arrival it happened that they had depreciated in value and the San Francisco house repudiated the contract, claiming their right to do so under the rule now contended for. A system of law that would tolerate such an evasion of responsibility would be unworthy of a civilized people. * * *''

" '* * * The law is well settled that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own (*Breden v. Dubarry,* 14 Serg. & R. (Pa.) 30); and the waiver which makes the ratification equivalent to precedent authority is as much predicable of a corporation as it is of ratification by any other principal; and it is equally to be presumed from the absence of dissent. (*Gordon v. Preston,* 1

Watts, 387, (26 Am. Dec. 75).)' Quoting from *Bank of Pennsylvania v. Reed,* 1 Watts & S. 101, the court said: 'When the principal has been informed of what has been done, he must dissent and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed. * * * Nor was it necessary, in order to bind the bank by their acquiescence, that notice should have been given to the directors, when sitting in their official capacity as a board. If they were personally cognizant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act, if they were unwilling that the bank should be bound by it. It would be unjust to permit the plaintiff to spend his time and money for the detection of the thief, on the faith of the promised reward, and then repudiate the offer, as unauthorized, when he had succeeded. * * *' "

B. The execution of contract with Appellee was within the apparent authority of the president.

In his comments on Appellant's statement of the case Appellee has quoted from the Transcript at great length, indicating some of the activities of the president of Appellant corporation which clearly establishes his apparent authority to execute this contract, even though it not be interpreted as a formal contract of partnership. It would, therefore, unduly extend this brief to repeat those actions here, except to point out that for a period beginning in 1950 and continuing to the date of the trial of this action no other person dealt with the affairs of this corporation

in Guam except the president. It is quite apparent that actions of the board of directors of this corporation were *pro forma* in nature and that its activities were dominated by its president. The situation is best exemplified by a quotation from the transcript at page 380 when the attorney for the Appellee asked the president of Appellant corporation to explain why he had written a letter to Appellee stating that the contracts had been ratified, even though the board of directors had purportedly adopted a resolution to the contrary. His answer was as follows:

> "Q. Did you recite (sic write?) that?
>
> A. *I did because I could have forced the board to ratify."* (Emphasis Added).

IV. THE TERM OF THE PARTNERSHIP BY ESTOPPEL OR JOINT VENTURE BETWEEN THE PARTIES, AS WELL AS ALL OTHER DETAILS OF THEIR RELATIONSHIP, IS FIXED BY THE AGREEMENT BETWEEN THE PARTIES.

Beginning on page 40 of its brief, Appellant undertakes a series of arguments which start upon the assumption that the joint venture or partnership was dissolved (a) on July 2 (approximately a week after it started) by a breach of the Appellee, (b) that even if this breach did not cause dissolution (Appellant's Opening Brief, page 44), the enterprise was dissolved by notice and (c) through the silence and acquiescence of the Appellee.

It is Appellee's position that none of these contentions have merit for the following reasons:

A.

Appellant contends that Appellee breached the agreement by leaving Guam in July, 1952 and contends that this act caused the dissolution of the partnership as of that date. (Appellant's Opening Brief, Page 40 et seq.). *Apparently, the Appellant takes the position that the Articles of Co-Partnership executed by and between the parties hereto are binding contractual promises, but only insofar as duties and liabilities are created on the part of the Appellee, Mr. Joseph Siciliano.* As an elemental rule of the law of contracts, an agreement must be mutually binding upon both parties, or it is binding on neither (Restate., Contracts, Section 80).

Appellee contends that the Articles of Co-Partnership created a binding and contractual relationship between the parties hereto in the nature of a partnership, and that the basic issue as raised by the trial below is (1) whether or not Section 8 of said agreement requires the Appellee to manage the partnership business, (2) whether or not, assuming such duty does exist, his physical presence is implied by or expressly necessary to fulfill such duties, and (3) whether or not the Appellee did manage the business by delegation to his agents and employees, and the performance thereof was accepted by Appellant. Furthermore, Appellee contends that, under the facts as found by the trial court, the Appellant, by its wrongful exclusion of Appellee from the partnership and refusal to recognize any of his rights therein, and by its secret and wrongful diversion of partnership funds into a

competing business, wrongfully caused the dissolution of the partnership under the applicable provisions of the Uniform Partnership Act as enacted on Guam. In support of the foregoing, Appellee refers to his argument thereto beginning on page 11 of Appellee's Opening Brief as cross-appellant.

Appellant contends that because Appellee left Guam on July 2, 1952, he breached the agreement and thereby caused a *pro tanto* dissolution (Appellant's Opening Brief, Page 41). Appellant contends that the trial court found this breach as a fact and, therefore, should determine all rights as of that date. The trial court did find that Appellee breached the agreement as of July 2, 1952 but that no damage resulted from said breach. Furthermore, Appellee contends that said finding is a mere conclusion of law based upon an erroneous interpretation of the agreement between the parties. That Appellee left the island of Guam on said date is not disputed; the issue lies, not in a question of fact, but a question of law to wit: Was this leaving inconsistent with the terms of the contract and the intent of the parties, as shown by said contract? (Guam Code of Civil Procedure, Section 2102; *Coots v. General Motors Corp.* (1934) 3 Cal. App. 2d 340, 39 P.2d 838).

As pointed out in his Opening Brief as Cross-Appellant, Appellee contends that there is neither authority in law nor in the contract for holding that he breached his agreement merely by leaving Guam on July 2, 1952. Certainly, the contract does not say that Appellee cannot leave Guam during its existence,

which is for a period of fifty (50) years, at any time under any circumstances. To contend otherwise would be to advance the absurd contention that Appellee by the execution of this agreement sentenced himself to fifty (50) years on this island which is only approximately 30 miles long by 12 miles wide.

Nor does the law recognize any such proposition. The absence from the state of one partner does not constitute an abandonment of the business to the co-partner. See *Carrie v. Cloverdale Co.,* 90 Cal. 84, 27 P. 58; also see *Lampher v. Washauer,* 28 C.A. 457, 152 P. 933, which holds that the absence of one partner for a temporary period from the partnership, even though contrary to the partnership agreement, does not dissolve the partnership and, further, that a partner by his mere absence does not abandon the partnership and does not lose his right in equity for an accounting and settlement. Also see *Bernheim v. Porter,* 2 Cal. Unrep. 349, 4 P. 446, as authority for the proposition that the absence from the state of one partner does not work a dissolution of the partnership.

B.

As to termination of the relationship of the parties by notice, even the Appellant is not quite sure as to when this notice was given and when it was supposed to be effective. A so-called "conditional ratification" was purportedly adopted by the board of directors of Appellant corporation on October 6, 1952, but whatever else this document was, it was certainly not a notice of termination of relationship. In addition to

this factor, the notice was followed within three or four days by a letter from the president of Appellant corporation, advising Appellee that the contracts had been formally approved and ratified by the board of directors. The other so-called notice of termination was in April 1953 and constituted a unilateral action by the Appellant corporation. This notice simply declared the venture terminated and offered Appellee back his original investment, conditioned upon his release of his rights in the venture. There is no suggestion in any of these communications or in any subsequent communication that the assets of the venture were to be sold and the proceeds distributed to the parties or that the profits to date were to be divided. IN OTHER WORDS, THE SO-CALLED NOTICE OF APRIL 1953 MEANT IN SUBSTANCE: WE WENT INTO A VENTURE, IT IS PROFITABLE AND WE ARE GOING TO TAKE OVER ALL THE ASSETS AND KEEP THE PROFITS. IF YOU AGREE TO THIS WE WILL RETURN YOUR ORIGINAL INVESTMENT, BUT WILL GIVE YOU NOTHING FOR YOUR TIME, YOUR EMPLOYEES OR YOUR RISKS.

Appellee believes that, since the partnership was one for a fixed term, the only way that the partnership could be dissolved outside of court, was under the terms of the Articles of Co-Partnership, or by mutual agreement between the partners.

Because the agreement between the parties is expressly a partnership for a fixed term (Section 3,

Articles of Co-Partnership), and because a lease of real property is among the partnership assets, Appellant cannot terminate the relationship between the parties by mere notice. (*Zeibak v. Nasser* (1938) 12 Cal. 2d 1, 82 P. 2d 375, *Bates v. McTammany* (1938) 10 Cal. 2d 697, 76 P. 2d 513.)

If Appellant wanted to terminate this contract by notice a way is provided in the partnership agreement as follows:

> "12. Option of One Partner to Retire. In the event either party should desire to retire from the partnership, he shall give the other party written notice of his intention so to do and the remaining partner shall have an option for the ninety (90) days, next ensuing the receipt of such notice, to elect to buy out said retiring partner and acquire sole ownership of the business of Dairy Queen of Guam in the following manner:
>
> a. An inventory shall be taken on a day to be mutually agreed upon by the partners, and the interest of the retiring partner shall be determined from such inventory and in the manner customarily employed by the firm in preparing its financial statements, with the exception that good will shall be reflected as an amount equal to two and one-half (2½) times the net profits of the firm for the twelve (12) calendar months immediately preceding the said inventory date, after allowing six per cent (6%) interest on invested capital.
>
> b. Within ten (10) days after the interest of the retiring partner shall have been determined in the manner set forth in the preceding paragraph, he shall be paid by the remaining partner

> for said interest as follows: one-third ($\frac{1}{3}$) in cash or by duly certified check; one-third ($\frac{1}{3}$) by the remaining partner giving his promissory note for one-third ($\frac{1}{3}$) of the amount of such interest, payable six (6) months from said date, and bearing interest at the rate of six per cent (6%) per annum; and the remaining one-third ($\frac{1}{3}$) by giving a further promissory note for one-third ($\frac{1}{3}$) of the amount of such interest, payable twelve (12) months from said date, and bearing interest at the rate of six per cent (6%) per annum." (Record, pages 11-12).

C.

Appellee finds it difficult to understand an argument that by his silence he acquiesced in the forfeiture of his property. There were several courses open to Appellant if it had in good faith sought to dissolve this venture. It could have given notice as provided by the contract between the parties or it could have brought an action for dissolution. Neither of these courses were followed and the Appellant corporation's directors merely engaged in a frantic series of passing of resolutions, seeking to avoid their liability. There is no showing that they changed their position because of the acquiescence of the Appellee nor is there any showing that his silence led them into any peril or misunderstanding. In view of these facts, to contend that a one-half interest in a profitable business is forfeited merely because the partner or joint venturer does not immediately bring an action is to disregard the statute of limitations which effec-

tively fixes the time within which these matters can be brought to issue.

D.

As heretofore noted, Appellee contends that the rights and liabilities of the parties are fixed by the contract between them, even though this contract be not considered a formal partnership agreement. The law is clear that where the corporate partner is not able to sign a partnership contract, the courts will treat the transaction as a joint venture and will impose exactly the same rules as those that apply to partnership in considering all the relationships between the parties. The general subject of corporations as parties to joint ventures is covered in a note in 80 ALR at page 1049, and many cases are cited. The matter may be simplified, however, when it is recalled that the statutes of Guam were patterned after the statutes of California, and, hence, California cases are persuasive authority for the status of the law in that territory. Two California cases seem to dispose of the matter without further discussion. Thus, in the case of *Zeibak v. Nasser* (1938) 12 Cal. (2d) 1, 82 P. (2d) 375, the law is clearly stated that the rights and liabilities of joint adventurers as between themselves are covered by the same principles which apply to a partnership; and Section 2432 (now Corporations Code, Section 15038) of the California Civil Code (which is identical to the same numbered section of the Guam Civil Code) which relates to the rights of partners on dissolution is not confined in

operation to partnerships, but is applicable in the case of dissolution of joint ventures. The Court stated, among other things, on page 12 the following:

> "* * * The rule is that the rights and liabilities of joint adventurers as between themselves are governed by the same principles which apply to a partnership. * * *"

It is axiomatic that in dealing with partnerships and with all types of contracts the Court seeks to find out first what the parties themselves agreed to do and if there is no specific agreement as to what the parties wanted then must resort to implications and assumptions from their course of conduct. However, where there is a signed contract between the parties, by whatever name it may be known, which clearly sets forth their rights and obligations, then this document obviously is the best evidence and the only evidence of what the parties wanted and intended in their business relationship. It is, therefore, the Appellee's contention that in the case at bar the partnership contract is completely binding between the parties, even though the enterprise be technically known as a joint venture and not a partnership.

This view is supported by the cases and appears to be particularly strengthened by the holding of that portion of *Zeibak v. Nasser* (supra) which seeks to ascertain the term of the joint venture therein referred to. In that case the court found that the agreement between the parties was not entered into for any specific period of time and, therefore, in seeking for

some implied term intended by the parties, used the term of the lease of a theater building as being the intended term of the joint venture. This is not only good law but common sense in that the joint venture being for the purpose of operating a theater could be presumed to be for the term during which the theater was leased.

In the case at bar the court need only to look to the agreement between the parties to ascertain that a fixed term was agreed upon between the parties, but if it were to be contended that such a fixed term went beyond the scope of the particular joint venture in which the parties were engaged, it is abundantly clear from the record that as a part of the partnership agreement the Appellant cause to be assigned to the partnership the lease of the real property upon which the partnership business was and is now conducted (Plaintiff's Exhibit C, Record, page 54). The term of the lease was for five (5) years with an option to renew for an additional five (5) years (Record, page 55), and upon the authority of *Zeibak v. Nasser* (supra), a joint venture wherein an asset consists of a lease of property for the purpose of carrying on a particular business, will be deemed by implication to continue during the term of such lease (See also *Bates v. McTammany* (1938) 10 Cal. (2d) 697, 76 P. (2d) 513).

The *Zeibak* case above quoted also seems to dispose of the contention of the Appellant that the joint venture or partnership of the parties here could be

dissolved at will. In this connection the Court states on page 13:

"* * * Plaintiff further contends that, assuming the application of section 2432, Civil Code, to joint ventures, it does not apply here because the venture was one which could have been lawfully dissolved by the 'express will' of a member thereof, under section 2425(b), Civil Code. This section reads as follows: 'Dissolution is caused: * * * (b) By the express will of any partner when no definite term or particular undertaking is specified, * * *' This contention likewise cannot be upheld for the reason that the venture here was not one which could have been lawfully dissolved by the *express will* of a member thereof. Here there was a definite, and 'particular undertaking', voluntarily assumed by each of the partners, and as hereinabove stated, the term of the venture, at least impliedly, was of similar duration as the term of the leases under which the theatres were operated. In the case of *Bates v. McTammany,* 10 Cal. (2d) 697 (76 Pac. (2d) 513), this claim was also made. There the court found that the partnership was formed for the purpose of conducting a radio station 'so long as the license therefor could be obtained from the federal government'. The defendant contended that the partnership was one at will and that he was entitled to a dissolution under certain sections of the Civil Code, including section 2425 (b). The court there said, 'The finding that the partnership was formed for a definite undertaking * * * and so long as the federal license therefor could be procured, is fully supported by the record, and negatives any conclusion which otherwise might be drawn that the partnership was one at will.' * * *"

The case of *Irer v. Gawn* (1929) 99 Cal. App. 17, 277 P. 1053, also seems to dispose of most of the contentions of Appellant in this case. This case clearly holds that so far as the interests of the principals to a joint venture are concerned, it is immaterial whether the agreement be a co-partnership or a joint adventure, the legal principles applicable being the same. In the language of the court, appearing at page 23:

> "* * * but so far as the interests of the principals in this transaction are concerned it is immaterial whether it be deemed to be a co-partnership or a joint adventure for the legal principles which are applicable are the same (14 Cal. Jur. 760; *Butler v. Union Trust Co.,* 178 Cal. 195, 172 P. 601)."

So, also, the case of *Butler v. Union Trust Co.,* cited in the *Irer* case above, contains the following statement at 178 Cal., page 198:

> "* * * Joint adventure, however, is similar to a partnership and being of a similar nature the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement between the parties are governed by the same rules of law. * * *" (Cases cited, including *Clafin Co. v. Gross,* 112 Fed. 386.)

The matter is further clearly set forth in 14 Cal. Jur. at page 760 where the similarities and differences between the two types of enterprises are discussed and distinguished. The article concludes as follows:

"* * * Inasmuch, however, as the two relationships are similar, the rights and allegations of the joint adventurers, as between themselves, are governed by practically the same rules that govern the relation of partners. * * *"

In all of the cases and the text material referring to this matter it is perfectly clear that whether the transaction be called a joint venture or partnership, the court looks to the terms of the agreement between the parties to ascertain their respective rights and liabilities.

V. OTHER ARGUMENTS OF APPELLANT.

Since Appellee takes the position that the rights and obligations of the parties and the dissolution of their relationship is governed by the rules pertaining to partnership, he deems it unnecessary to comment further on various other arguments of the Appellant, particularly those which state that the Appellee was either entitled to no share of the profits or at most a share of the profits up to April 21, 1953, the date Appellant sent notice of termination to Appellee. So, also, with the Appellant's argument that if Appellee was entitled to a share of the profits to April 21, 1953, it should be a reduced share because Appellee contributed a lesser value to the venture than Appellant. As pointed out in the Appellee's comments on Appellant's statement of the case, Appellee actually contributed a full one-half of the value of the assets of the venture at the time of its commencement and, hence, as a mat-

ter of fact, as well as a matter of contract, was entitled to an equal division of the profits.

Nor can Appellee find any merit in Appellant's contention that Appellee was only entitled to profits for a limited period of time. The contract covers the liabilities of the parties, and even if it did not, Appellee is unable to find any case which even remotely holds that a partnership or joint venture once having been commenced can be terminated by the type of notice relied upon here. Certainly, there is no case which permits forfeiture of the Appellee's interest in the assets of the partnership, regardless of whatever his interest would be in the profits. It is significant to note that throughout this entire case Appellant has never referred to the value of the assets of this business, and apparently assumes that the only matter in controversy is the percentage of profits, if any, it should pay to Appellee, presuming that under some unspecified theory of the law the Court should leave Appellant in complete ownership and possession of all of the partnership assets. It is respectfully suggested that no such rule of law is in existence.

To contend that Appellee is only entitled to the return of his original investment with or without a share of the profits amounts to a forfeiture of his partnership interest. The law does not contemplate such a forfeiture, and it has been held that even where a partner has failed to pay his share of the capital, or its debts or expenses, there is no cause for forfeiture of such partnership interest in the partnership property (*Kimball v. Gearhardt* (1859) 12 Cal. 27).

See also *Martin v. Burris* (1922) 57 C.A. 739, 208 P. 174, also holding that to permit the retention by one party of any profits not in accordance with the agreement amounts to a forfeiture of a portion of this party's interest.

Appellee's contentions as to the proper method of computing profits in this action and for distribution of assets and otherwise liquidating the venture are set forth in his brief filed as Cross-Appellant herein and, therefore, in the interest of brevity will not be now repeated.

VI. ARGUMENTS REGARDING COMPANION CASE OF PACIFIC ENTERPRISES, INC. v. THE DAIRY QUEEN.

As pointed out in his comments on Appellant's statement of the case, Appellee believes that the issues in this case are questions of fact which should be left to the discretion of the trial court who was in the best position to judge the credibility of witnesses on conflicting testimony.

VII. COMMENTS ON APPELLANT'S POINTS NUMBER IX (PAGE 70), X (PAGE 73) AND XI (PAGE 74).

These three contentions of the Appellant do not appear to the Appellee to have any substantial merit. This Court has already decided the question of jury trial in Guam, and it appears idle to again review this question, particularly as to a civil action.

With regard to Appellant's motion for change of venue, the denial of which it is urging as a ground for

reversal, this likewise seems to possess little merit. It may be that the stockholders and directors of Appellant corporation live in the State of Washington, but all of the transactions involving this controversy took place in the Territory of Guam. The business was located there, the contract was to be performed there and the matter was within the jurisdiction of the District Court there. Certainly, no showing was made that it would be more convenient to transport all the witnesses from Guam to Seattle to have the trial in that state.

So, also, in the case of Appellant's motion for a continuance. The action was filed on September 20, 1954, and the Interlocutory Judgment filed February 18, 1955. Surely the Appellant had ample notice to have whatever supplemental papers he wished sent to Guam. The president of Appellant corporation was on Guam for weeks before the trial and Appellee, on the hearing of the motion for continuance, questioned the good faith of Appellant in asking for the same. Actually, during the trial (Record, page 215) Mr. Thompson testified that the records referred to in his affidavit for continuance are presumed lost. Nor has Appellant ever contended that the missing reports are now located, and if produced, would materially alter the decision of the Court.

With respect to the somewhat odd theory advanced by Appellant under item XI on page 74, the Appellee has little comment. Obviously, Appellee was represented by a different counsel than Appellant in the action involving the dissolution of the partnership.

Appellee's same counsel brought an action on behalf of Appellee's corporation against the co-partnership for services rendered, and this action was vigorously defended on behalf of Appellant who had all of the assets and was in complete control of the partnership properties, books and records. What would have been gained by separating Appellant and Appellee as Defendants in the companion suit is not pointed out. It may be assumed that the same testimony would have been given by all parties in the separate suits. Furthermore, the liability of the co-partnership to Pacific Enterprises, Inc., was a partnership liability to be borne from the partnership assets. How this could have been accomplished by two separate suits against the co-partners or co-venturers individually is unknown.

VIII. CONCLUSION.

Appellee respectfully submits that the correct analysis of the law and the facts in the case at bar is contained in his Opening Brief as Cross-Appellant.

Dated, Benicia, California,
February 24, 1956.

Respectfully submitted,
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